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In the Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-886

MICHAEL J. MARTORELLA,
ANTHONY J. MARTORELLA,
ORPHIA A. ESPOSTO, and
JOSEPH NUGARA, JR.,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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Your Petitioners, Michael J. Martorella, Anthony J. Martorella, Orphia A. Esposto and Joseph Nugara, Jr., pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Third Circuit entered in the above-captioned case.

OPINIONS BELOW

An opinion was rendered by the United States District Court for the Western District of Pennsylvania granting in part and suppressing in part Defendants' Motion to Suppress. Said opinion is not reported but is set forth herein at Appendix A.

An opinion affirming the District Court's Judgment of conviction was rendered by the United States Court of Appeals for the Third Circuit. Said opinion is not reported but is set forth herein at Appendix B.

JURISDICTION

The opinion and order of the United States District Court for the Western District of Pennsylvania was filed August 3, 1976. The judgment order of the United States Court of Appeals for the Third Circuit was filed on October 26, 1977. The petition for rehearing was denied on November 17, 1977. Pursuant to Rule 22 of the Rules of this Honorable Court, the within Petition for Writ of Certiorari is being filed within thirty (30) days after the entry of the Court of Appeals' final order.

The jurisdiction of this Honorable Court is invoked under Title 28 United States Code, Section 1254(1).

QUESTIONS PRESENTED

Is it a violation of 18 U.S.C. 2518(1)(e) and 2518(2) for the Government Attorney to deliberately fail to advise the authorizing Judge that the subjects of a wiretap application before the Court were previously intercepted during the course of an illegal wiretap?

Whether "gross revenue of $2,000 in any single day", a necessary element of an illegal gambling business under 18 U.S.C. §1955, must be proven by evidence of the amount of monies won by the business and not simply by the amount of monies wagered with the business?

Whether the Third Circuit's decision finding Petitioner Nugara to be involved in the illegal gambling business is in conflict with *United States v. Leon*, 534 F.2d 667 (6th Cir. 1976), and *United States v. McCoy*, 539 F.2d 1050 (5th Cir. 1976)?

STATUTES INVOLVED

Title 18, United States Code, Section 2518(1)(e) provides as follows:

> "2518. Procedure for interception of wire or oral communications.
>
> (1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:
>
> (e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application."

Title 18, United States Code, Section 2518(2) provides as follows:

> "(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application."

> **§1955. Prohibition of illegal gambling businesses**
>
> (a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.
>
> (b) As used in this section—

(1) "illegal gambling business" means a gambling business which—

(i) is a violation of the law of a State or political subidivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(c) If five or more persons conduct, finance, manage, supervise, direct, or own all or part of a gambling business and such business operates for two or more successive days, then, for the purpose of obtaining warrants for arrests, interceptions, and other searches and seizures, probable cause that the business receives gross revenue in excess of $2,000 in any single day shall be deemed to have been established.

(d) Any property, including money, used in violation of the provisions of this section may be seized and forfeited to the United States. All provisions of law relating to the seizure, summary, and judicial forfeiture procedures, and condemnation of vessels, vehicles, merchandise, and baggage for violation of the customs laws; the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from such sale; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred or alleged to have been incurred under the provisions of this section, insofar as applicable and not inconsistent with such provisions. Such duties as are imposed upon the collector of customs or any other person in respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the customs laws shall be performed with respect to seizures and forfeitures of property used or intended for use in violation of this section by such officers, agents, or other persons as may be designated for that purpose by the Attorney General.

(e) This section shall not apply to any bingo game, lottery, or similar game of chance conducted by an organization exempt from tax under paragraph (3) of subsection (c) of section 501 of the Internal Revenue Code of 1954, as amended, if no part of the gross receipts derived from such activity inures to the benefit of any private shareholder, member or employee of such organization except as compensation for actual expenses incurred by him in the conduct of such activity.

Added Pub.L. 91-452, Title VIII, §803(a) Oct. 15, 1970, 84 Stat. 937.

STATEMENT OF THE CASE

History

On June 13, 1974, Defendants Orphia A. Esposto, Michael J. Martorella, Joseph Nugara, Jr., Anthony Joseph Martorella, Dominic Nicholas DiSilvio, Norma Jean Lame and Anthony Michael Wincko were indicted at Criminal Number 74-185 in the United States District Court for the Western District of Pennsylvania. Defendants were charged

in two counts with violating Title 18 U.S.C. 1955, 371 and 2. Count one alleges that from November 1, 1972, to the date of the indictment, Defendants conspired to conduct, finance, manage, supervise, direct and own a gambling business which was illegal under 18 U.S.C. 1955, in violation of 18 U.S.C. 371. Count two alleges that for the same period, Defendants did conduct, finance, manage, supervise, direct and own an illegal gambling business, such business having a gross revenue of $2,000.00 or more on one or more single days, involving five or more persons, being in substantially continuous operation for a period in excess of thirty days, and being illegal under Pennsylvania law, in violation of 18 U.S.C. 1955 and 2. The evidence in support of the indictment was primarily obtained as a result of a fifteen-day wiretap on the telephones of Michael J. Martorella, the Braddock News Agency and two other named individuals.

In 1971, Michael J. Martorella and Anthony J. Martorella were indicted at No. 71-61 in the United States District Court for the Western District of Pennsylvania for violations of 18 U.S.C. 1084 and 1952. That indictment was based on evidence obtained as a result of thirty days of wire interceptions on the telephones of William Cihal. During the course of both the original fifteen-day interception and the fifteen-day extension thereof, numerous conversations of both Martorellas were overheard.

The applications in the *Cihal* case sought authorization to intercept wire communications of William Cihal and others as yet unknown. Neither application named anyone other than Mr. Cihal in spite of numerous conversations intercepted.

The evidence in the Cihal case was suppressed by the District Court, *United States v. Cihal*, 336 F.Supp. 261, for failure to comply with the authorization requirements of Title III.

The application for the instant wiretaps sought authorization to intercept the communications of Michael J. Martorella and others not here relevant. The application listed several previous applications involving the same persons specified in the application, including one in which Michael Martorella, although not named, was intercepted. The *Cihal* interceptions, however, were not listed.

Defendants filed motions to suppress alleging, inter alia, that the provisions of Title III were violated by the Government's failure to advise the Court of the *Cihal* interceptions. On August 2, 1976, the District Court denied the motions of Esposto, Nugara, Wincko and Lame, and granted the motions of the Martorellas, holding that the instant interception was prima facie the fruit of the prior illegal tap. The Court, however, granted the Government the opportunity to establish an independent origin — apart from the *Cihal* tap — for this interception.

A hearing was held on October 28, 1976, and it was held that the Government had established an independent origin for the probable cause for the instant interception.

On November 1, 1976, the Martorellas, Anthony Wincko and Dominic DiSilvio entered a conditional guilty plea to the charges, preserving for appeal their challenge to the legality of the wiretaps. The remaining Defendants went to trial before the Honorable Daniel J. Snyder and a jury.

The Court granted the Government's oral motion to dismiss the indictment against Defendant Lame after several days of trial and Defendants Esposto and Nugara were convicted on both counts on November 19, 1976.

The Martorellas and Esposto were sentenced to three years imprisonment and fined $20,000.00. Nugara was sentenced to two years imprisonment and fined $10,000.00.

The judgment of the District Court was affirmed by the Court of Appeals on October 26, 1977.

The petition for rehearing was denied on November 17, 1977.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I

There is a conflict in the circuit court decisions interpreting 18 U.S.C. 2518(1)(e).

In *United States v. Abramson*, 553 F.2d 1164, 8th C., 1977, two defendants who had been intercepted in 1970 during the course of a wiretap held illegal under *United States v. Giordano*, 416 U.S. 507, 94 S.Ct. 1849, 40 L.Ed.2d 341, were named as subjects of a wiretap application in 1973. Although the defendants were not named in the 1970 application, the 1970 tap was listed in the 1973 application, but the Court was not told that the earlier tap had been suppressed. The Court said that by failing to advise the authorizing judge that the earlier tap had been suppressed, the Government violated 2518(1)(e) because the application did not contain a full and complete statement of the facts of all previous applications involving any of the same persons, facilities or places specified in the application. The Court then went on to say, however, that 2518(1)(e) was not a central statutory provision and that violations of it did not require suppression of the evidence.

This holding placed the case squarely in conflict with the decision in *United States v. Bellosi*, 501 F.2d 833, D.C.C.A. 1974, which held that a violation of 2518(1)(e) did require suppression of the evidence because that provision directly implemented the congressional intention to limit the use of intercept procedures to those situations clearly calling for the use of this extraordinary investigative device.

In *Bellosi*, the Court gave the same expansive reading to 2518(1)(e) that this Court later gave to sections 2518(1)(b)(iv) and (8)(d) in *United States v. Donovan*, ___ U.S. ___ , 97 S.Ct. 658, 50 L.Ed.2d 652, saying that

"applications" was used in the statute because it was at once a broader term than "interceptions" and yet more susceptible to a precise definition. The Court felt that all prior "interceptions" would have to be included under "application" except unauthorized wiretaps which the Government would not be likely to reveal whatever term was used.

By requiring the listing of prior applications instead of prior interceptions, the Court felt that Congress intended to encourage compliance with its regulative scheme by filing an application for judicial approval.

It was also noted that by using "application" instead of "interception" Congress may have been trying to avoid an ambiguity which inheres in the latter word and not in the former; specifically, that "interceptions" might require disclosure of each of possibly hundreds of phone calls, whereas "applications" requires only the information that the person, place or facility was the subject of an interception enabling the Court to use its supplemental inquiry power under 2518(2) to obtain whatever additional information it deemed appropriate or necessary.

The issue arises in this case, as it did in the *Abramson* case, as a result of the numerous wiretaps declared illegal under this Court's decision in *United States v. Giordano*, supra. However, unlike the *Abramson* case, the failure to advise the Court of the prior illegal wiretap here was intentional. The prosecuting attorney who prepared the application freely admitted that he was aware of the *Cihal* interception and that the Martorellas were parties to it. He chose not to tell the Court about it, however.

The effect of the decision here is that that the Government may intentionally conceal from the Court the fact that a person who is expected to be intercepted during the course of a wiretap being applied for was previously

intercepted during the course of an illegal wiretap. The possibility of information or leads from information obtained during the course of the illegal intercept establishing in whole or in part probable cause for the subsequent application then becomes very real.

An intentional violation of even a secondary provision of Title III should not be tolerated by this Court. In addition, the conflict between the Circuits as to whether 2518(1)(e) is a secondary or central provision of Title III must be settled.

In addition to violating 2518(1) (e), the failure to advise the Court of a prior illegal interception also violates 2518(2), the supplemental inquiry section of Title III, because it frustrates the Court's opportunity to make appropriate inquiry. If there is no routine duty to supply the authorizing judge with relevant information, the judge has no basis for making additional inquiries and his discretion is effectively usurped by the prosecutor.

A similar obligation was imposed on the Government by this Court in *United States v. Donovan*, supra, in respect to the service of inventories under 2518(8)(d).

The Government argued that that provision did not require law enforcement authorities to routinely supply the judge with specific information upon which to exercise his discretion because he has the option of asking for additional information if he wants it.

The Court rejected that argument saying that no purpose would be served by holding that the authorities have no routine obligation to supply the judge with relevant information.

The reasoning which led to that conclusion is equally applicable to the present situation. In deciding whether legitimate privacy interests may be invaded, a judge is likely

to require information beyond that contained in an application. He has a supplemental inquiry right to enable him to obtain such information, but, if the Government chooses not to furnish him with relevant information, he has no basis for further inquiry.

If the disclosure of a prior illegal tap of an "aggrieved person" is not required in a later application to intercept his conversations, the suppression rights afforded him relating to the first tap would be effectively negated because the suppressed tap could provide the basis for a subsequent application. In addition to completely frustrating Congressional intent to give the authorizing judge a complete history of prior surveillances, this encourages the use of illegal or unauthorized taps.

The narrow interpretation given to 2518(1)(e) and (2) by the lower courts here also conflicts with the very broad reading this Court gave to section (1)(b)(iv) and (8)(d) in *United States v. Donovan*, supra.

As they did with (8)(d), the Government urged a very narrow reading of (1)(b)(iv) in *Donovan*. It was argued that the statute required the naming of only the principal target in the application. The Court rejected that argument, however, saying that such an interpretation would be in conflict with other provisions of the statute and would not serve the Congressional purpose.

Likewise, in considering the requirements imposed by 2518(8)(d), the Court in *Donovan* interpreted the statute to require more than its plain language would seem to indicate. The statute mandates inventory notice only for persons named in the application or order, and also provides that the judge may order similar notice to other parties to intercepted communications, if he concludes that such action is in the interest of justice.

As indicated above, the Government argued that because this notice provision does not expressly require law enforcement authorities routinely to supply the judge with specific information upon which to exercise his discretion, it would be inappropriate to read such a requirement into the statute since the judge has the option of asking the law enforcement authorities for whatever information he desires. The Court disagreed, however, and imposed a duty on the Government to classify all those whose conversations have been intercepted and to transmit that information to the judge and, if he needs more information to exercise his statutory discretion, to furnish him with that as well.

This responsibility was allocated to the Government because the Court believed it best served the purpose of Title III, which was viewed as reducing the threat of completely surreptitious surveillance, affording aggrieved persons the right to pursue an appropriate remedy, deterring abusive use of wiretaps and winning the confidence of the community that the techniques are fairly employed. These goals would be frustrated by a restrictive reading of 2518(1)(e) and (2) and the various sections of the Act placed at cross purposes.

As recognized by this Court in *Donovan*, the failure to fully advise the Court of facts of intercepted communications that the prosecution has greater access to and familiarity with, results in the authorizing judge being denied the opportunity to exercise his discretion. As aptly noted in *United States v. Chun*, 503 F.2d 533, 9th C., 1974, "Discretion cannot be exercised in a factual vacuum."

For 2518(2) to have any meaning, there must be an obligation on the Government to furnish the Court with relevant information to enable it to exercise its discretion.

Because this provision is critical to implementing Congressional intent that wiretaps not be authorized except

under strict judicial control, it is respectfully submitted that the question raised in this petition should be considered by the Court.

II

Petitioners Esposto and Nugara pose an important question of federal law which has not been, but should be, settled by this Court. They ask this Court to determine whether "gross revenue of $2,000 in any single day", a necessary element of an illegal gambling business under 18 U.S.C. §1955[1], must be proven by evidence of the amount of monies won by the business and not simply by the amount of monies wagered with the business.

In both counts one (1) and two (2) of the instant indictment, Esposto and Nugara are alleged to have been involved in an illegal gambling business which had a "gross revenue of $2,000 or more on one or more single days" in violation of 18 U.S.C. §1955. In the lower court, Esposto and Nugara contended that the government failed to prove this specific allegation and that the evidence presented was not sufficient to sustain the verdict against them. As this Court has held, ". . .[t]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable

[1]18 U.S.C. §1955 is entitled "Prohibition of illegal gambling businesses" and states in pertinent part as follows:

"(1) 'Illegal gambling business' means a gambling business which —

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day."

doubt of every fact necessary to constitute the crime with which he is charged". *In Re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073 (1970). Here, Esposto and Nugara argued that they were convicted of the offenses alleged in the indictment without proof of each fact necessary to constitute those particular offenses.

The government introduced wiretap and other evidence to establish that the gambling business in question had a gross revenue of $2,000 on certain days. The expert witness for the government interpreted the evidence and testified to the *amounts wagered* each day from April 13, 1973, to April 27, 1973. Counsel for Esposto was prevented from questioning the expert concerning the amounts of the wagers *won* by the gambling business on these dates. In arguing that the total amount wagered is not the proper criterion for measuring gross revenue, he made the following statement:

> "MR. LIVINGSTON: I am proposing to show by chart which I would like to make part of the appellate record, that according to the total amount wagered on each day, that the Supreme Court of the United States has not yet decided what is meant by the gross business of the bookmaker when they are talking in terms of $2,000 a day.
>
> It is my purpose for establishing this on the record, to have the record for appellate review in order to be able to argue that there is no obligation of anybody to pay anything to the bookmaker until the game is complete and only then does the bookmaker stand to be in a position to determine what his gross is for a given day. I would like, based upon the records that I have illustrated, to make the following record for appellate review."

Counsel for Esposto went on to say:

> "MR. LIVINGSTON: Without belaboring this, I would simply offer to show in the present state of the record on the question of what is the gross wagered, or the gross business of the bookmaker in order to give the Federal Court jurisdiction over the gambling operation, that the total amount wagered is not the criteria, and that is sufficient I think."

Thereupon, the lower court again sustained the government's objection to the cross examination of the expert in regard to this matter. Petitioners argue that evidence of "amounts wagered" is inadequate to prove the gambling business met the $2,000 per day gross revenue requirement, and that only evidence of the amount won is adequate to prove this requirement.

The figures testified to by the expert did not represent gross revenue. Revenue means income. Gross revenue is total income before expenses.[2] In *United States v. Ceraso*, 467 F.2d 653 (3d Cir. 1972), the defendant claimed that gross revenue was net profit. The Third Circuit rejected this argument, pointing to the inordinate burden such a construction would place on the government; the bookmaker's "carefully secreted" records would have to be introduced to prove his expenses. 467 F.2d at 657. Esposto and Nugara agree that gross revenue is not net profit, but they object strenuously to the interpretation of gross revenue as the total amount wagered.

Congress originally asserted its power to regulate gambling on the grounds that the money derived therefrom flows in interstate commerce. See The Organized Crime Control Act of 1970,84 Stat. 922; and Remarks of Senator Hruska, 115. Cong. Rec. 10736 (1969), quoted in *United States v. Ceraso, supra* at 657. However, no money can flow

[2]See: *Black's Law Dictionary*, 1482 (4th Ed. Rev. 1968); *The Random House College Dictionary*, 1129 (Rev. ed. 1975).

from an amount wagered, only from an amount won. In the case of sports betting, no money changes hands, no obligation to pay occurs, until the completion of the particular game on which the wager has been made. When the bookmaker wins, he is paid by the bettor. This is gross revenue. It is simply the total amount won, excluding losses and other expenses, and can easily be determined by comparing the wagers made with the scores of the games they were made on. There is no burden on the government, no carefully secreted records to find. It need only look at a newspaper to find which games the bookmaker has won, and tally his winnings.

It is submitted that Congress could not have intended gross revenue to mean amount wagered since the "flow of moneys and goods in interstate commerce" cannot be affected until the bookmaker receives money. Petitioners claim that Congress intended "gross revenue" to mean winnings, i.e., money paid or owed to the bookmaker.[3]

This claim is more easily understood by reflecting on an analogy. If a supermarket grosses $2,000 or does $2,000 in business in a single day, it is generally understood that, as a result of purchases by customers on that day, the supermarket has received or is owed $2,000. The grocer has expenses, and even though they may exceed $2,000 he is still said to have a gross revenue of $2,000 for that day. Likewise a bookmaker who grosses $2,000 or does $2,000 in business in a single day has received or is owed $2,000 as a result of the

[3] See also the "Statement of Findings and Purpose" which serves as the preamble to the "Organized Crime Control Act of 1970", 84 Stat. 922, (Section 1 of Public Law 91-452). This statement of Congressional intent clearly presupposes the actual flow or exchange of monies such that the interstate commerce power is triggered. However, as discussed above, the mere placing of a wager does not necessarily result in the flow or exchange of monies.

wagers he has won on a particular day. The bookmaker, too, has expenses, most notably, the wagers he has lost.

In other words, the bookmaker is owed nothing and he owes nothing at the time when the wagers are made. As a result of the outcome of the sports contests upon which the wagers are made, the bookmaker may win some money and may lose some money. If, for example, he wins $3,000 in wagers and loses $10,000 he still has income, or gross revenue, of $3,000. Gross revenue, quite simply, is the amount of money the bookmaker is entitled to receive on account of the wagers he has won.

In other instances, Congress can and has used specific, unequivocal language to refer to the total amount wagered. 26 U.S.C. §4401, for example, states:

> "There shall be imposed on wagers...an excise tax equal to 2 percent of the amount thereof."

The tax is clearly levied against the amount wagered. On the other hand, 18 U.S.C. §1955(b) (iii) requires as an element of an illegal gambling business "a gross revenue of $2,000 in any single day". If Congress had meant the $2,000 figure to represent the total amount wagered, it would have provided that the gambling business "accept wagers totalling $2,000 in any single day". It did not do so.

Accordingly, "gross revenue of $2,000 in any single day" under 18 U.S.C. §1955 must be proven by evidence of the amount of monies won by the gambling business and not by the amount of monies wagered with the business.

III

Petitioner Nugara contends that the lower court's decision finding him to be involved in the illegal gambling business is in conflict with *United States v. Leon*, 534 F.2d

667 (6th Cir. 1976), and *United States v. McCoy*, 539 F.2d 1050 (5th Cir. 1976).

The indictment alleges that Nugara and his co-defendants conspired to and did conduct, finance, manage, supervise, direct and own an illegal gambling business in violation of 18 U.S.C. §1955. Nugara argued below that the evidence of record fails to support such an allegation, and that the government did not prove that he was a conductor, or an integral and necessary part, of the gambling operation referred to in the indictment and established at trial.

The government's evidence in the case at bar consisted principally of recordings of 116 monitored telephone conversations involving the co-defendants. Of these, Nugara was a party to only two conversations. One was a call from a telephone in the Braddock News Agency which was not gambling related in any way, and was only offered to show Nugara's presence on those premises on one occasion. It is noteworthy that the Braddock News Agency is located a few blocks from Nugara's place of business, the Comet News, and was a supplier-distributor of newspapers and magazines with Nugara's business being a regular customer. The second telephone call was a conversation between Nugara and Esposto regarding the type of parlay betting system[4] each was using. Nugara was offering a three team parlay with one "favorite" and two "underdogs"; Esposto was surprised at this and threatened to offer a four team parlay. The government expert concluded that this single conversation showed Nugara to be an "agent" for Esposto. However, during the conversation, Esposto says: "But you should have

[4]A "parlay" is a type of bet involving two, three or four teams depending on the number offered by the individual bookmaker. The greater the number of teams, the greater is the possible payout to the bettors. Therefore, the greater the number of teams, the more attractive it appears to the bettor. A bettor is likely to place his wager with the bookmaker who offers the greater number of teams.

done it in the first place, I was very much surprised. I didn't understand it". If Nugara was his "agent" and in the business, it is reasonable to assume Esposto would have known and understood. Esposto also said: "All right, you guys are gonna start playing around with me, I'm gonna tell you something. I'll put four teamers on the. . . . board." Again, the conversation demonstrates that Esposto and Nugara are not in the same gambling business. Esposto is threatening to undercut Nugara; this is certainly not indicative of how partners would operate their business. Moreover, if Esposto really was the superior and exercised control, he would simply have told Nugara to change his system. Of course that did not occur because the businesses were different and separate.

Aside from the single telephone conversation between Nugara and Esposto, the government presented no evidence whatsoever of any involvement between Nugara and any other co-defendant. The government did offer testimony and exhibits resulting from interviews, personal and photographic surveillance, wiretaps and immunity grants, but none of it concerned Nugara. The attempt to link him to the illegal gambling business charged in the indictment depended solely on the one telephone conversation.

While it is true that the government also presented evidence gathered from a search of Nugara's place of business, the government expert could not connect it to the subject gambling business (as operated by co-defendants Sanchilli and DiSilvio). The one pack of wagering slips was at least two months old, and the money found in the safe was not related to those slips. No slips or monies were found on Nugara's person.

In short, the entire government case against Nugara consisted of his single telephone conversation with Esposto. It is plain (as the government expert recognized) that neither

individual is placing a bet or "laying-off"[5]. The conversation is nothing other than two individuals discussing what betting system each is offering to the bettor; this is analogous to two bookmakers keeping their "lines"[6] the same. Such evidence, it is submitted, is wholly inadequate to connect Nugara with the specific illegal gambling business which is alleged in the indictment.

In *United States v. Guzek*, 527 F.2d 552, 557-558 (8th Cir. 1975), the Eighth Circuit reviewed four 18 U.S.C. §1955 cases[7] and concluded that:

> "...the mere placing of bets by one bookmaker with another or the mere furnishing of line information in and of itself may not be sufficient to establish the interdependence of the bookmakers so as to fuse them into one single business for the purpose of counting each of these participants toward the five persons necessary to establish a violation of 1955.
>
> The relationships between the bookmakers must be closely analyzed to ascertain whether they are truly independent or whether their relationships serve to weld them into a single gambling business, usually centering on the monitored bookmaker. As we have noted in earlier cases, the existence of layoff betting, by which the profits of the gambling enterprise are shared and the risk of loss of each is reduced, is an important factor to be considered."

Here, it is undisputed that there is no evidence of any layoff betting between Nugara and Esposto or Nugara and any other individual named in the indictment. The government then did not establish the "interdependence" or these bookmakers, nor a relationship which served "to weld them into a single gambling business".

The "phenomenon of layoff betting" in §1955 cases has also been reviewed in *United States v. Box*, 530 F.2d 1258, 1265-1266 (5th Cir. 1976), where the Fifth Circuit explained:

> "In almost every case, the question has been whether the exchange of layoff bets, usually in addition to the exchange of line information, could be enough to link two separate bookmaking operations into one business for the purposes of meeting the §1955 jurisdictional requirement of five participants in one business. The answer has in every case been affirmative — *the regular direct exchange of layoff bets and line information* can connect otherwise dependent gambling operations, which alone would be illegal under state but not federal law (because less than five participants were involved), into one business." (footnote omitted, emphasis supplied).

In the instant case, the single telephone contact between Nugara and Esposto cannot, by any stretch of the imagination, be regarded as proof of a "regular direct exchange of layoff bets and line information". Nugara's

[5] A definition of "layoff betting" is presented in *United States v. Thomas*, 508 F.2d 1200, 1202 n. 2 (8th Cir.), cert. denied, 421 U.S. 947, 95 S.Ct. 1677 (1975):

> "To protect against losses, a bookmaker normally engages in 'layoff' betting whereby he passes on to another bookmaker the amount of bets by which his own 'book' is unbalanced; thus to the extent he loses to his own customers, he wins back from the other bookmaker, or vice versa. The 'layoff' bet is therefore, in effect, bookmaker's insurance or reinsurance."

[6] The *Thomas* case also offered a definition of "line":

> "The 'line' constitutes the 'odds' or 'handicaps' or 'point spreads' on the wagered contests. This is a list of t' e teams and events with a certain number of points attributed to the nonfavored team. To win a bet on the favored team, therefore, that team must win by a score exceeding the point spread given to the nonfavored team. The 'line' is subject to change as a given event approaches and a bookmaker may alter the 'line' on a particular event in order to try and even out the money wagered on each side." 508 F.2d at 1202 n. 2.

See also: *United States v. Ceraso, supra*, 467 F.2d at 655 n. 3.

[7] *United States v. Brick*, 502 F.2d 219 (8th Cir. 1974); *United States v. Thomas, supra*; *United States v. Schaefer*, 510 F.2d 1307 (8th Cir.), cert. denied, 421 U.S. 978, 95 S.Ct. 1980 (1975); *United States v. Bohn*, 508 F.2d 1145 (8th Cir.), cert. denied, 421 U.S. 947, 95 S.Ct. 1676 (1975).

bookmaking was not connected to any other operation, and "the record does not permit him to be cast in a role as a necessary or integral part", 530 F.2d at 1268, of the gambling business set forth in the indictment.

A recent decision which is very similar to the case at bar is *United States v. Leon*, supra, where the Sixth Circuit reversed a §1955 conviction because there was no direct evidence of a defendant's (Bourgeois) guilt, and the conviction was supported only by circumstantial evidence from which could be inferred either facts tending to prove guilt or facts tending to prove innocence.[5] Bourgeois conceded that he was a bookmaker; here, Nugara did not deny that he accepted sports betting wagers, and even admitted to possessing a federal wagering stamp and paying the federal wagering tax. At trial, Bourgeois and Leon were connected only by the recordings of their telephone conversations; here, Nugara and Esposto were linked by a single conversation. The only relevant evidence against Bourgeois was an exchange of "line" information and the making of bets between Bourgeois and Leon; here, there is a single exchange of betting system information (very much akin to "line" information) and no making of bets.

[5] The *Leon* court went on to explain:

> "As we held in *United States v. Saunders*, 325 F.2d 840, 843 (6th Cir. 1964), cert. denied, 379 U.S. 978, 85 S.Ct. 677, 13 L.Ed. 2d 568 (1965), a verdict of guilty cannot stand on appeal where the evidence 'at most establishes no more than a choice of reasonable probabilities' or inferences, one criminal and the other innocent. See also *United States v. Delay*, 440 F.2d 566, 568 (7th Cir. 1971), where the court stated, 'Where the evidence as to an element of a crime is equally consistent with a theory of innocence as with a theory of guilt, that evidence necessarily fails to establish guilt beyond a reasonable doubt.' For the same reasons, we conclude that the conviction of Bourgeois for conspiring to violate 18 U.S.C. §1955 must also be reversed." (footnote omitted), 534 F.2d at 667.

Assuming *arguendo* that the single telephone conversation between Nugara and Esposto allows an inference of guilt as well as an inference of innocence, Nugara strongly maintains that the same analysis employed by the *Leon* court is apposite.

After examining the recordings, the *Leon* court held that Bourgeois was not a "conductor of the business operated by Miller and Leon", and said:

> "we find it impossible to conclude from them that Bourgeois had an interest in the welfare of the business conducted by Leon or that Bourgeois' gambling activity was a part of the business conducted by Leon and Miller." 534 F.2d at 677.

Petitioner Nugara argues that the lower court should have reached the same conclusion. The record is devoid of any evidence that Nugara was a "conductor of", or had "an interest in the welfare of", or was "a part of" the gambling business in question.

Another recent decision which is supportive of Nugara's position is *United States v. McCoy*, supra, where a defendant's (Bell) §1955 conviction was also overturned for lack of sufficient evidence. The Fifth Circuit considered other §1955 cases and concluded that:

> "...a person who performs *a function necessary in the operation of a gambling enterprise* makes the person so performing, unless he is merely a customer or bettor, one of the jurisdictional five. Convictions should be upheld when based on the exchange of line information and the laying off of bets, when the evidence supports a conclusion that *such activity is reasonably necessary* to a gambling enterprise." 539 F.2d at 1060 (Emphasis supplied).

Here, the government's evidence does not show Nugara performing any "activity" or "function necessary in the operation" of the subject gambling business.

In reviewing the evidence against Bell, the *McCoy* court first observed that "not everyone who receives from or transmits line information to a bookmaker is guilty of a §1955

violation", 539 F.2d at 1061. Then, the court asked whether there was evidence "that Bell received line information to such an extent that this behavior substantially affected McCoy's business?", and said, "[i]f not, the convictions cannot be sustained", 539 F.2d at 1060. Here, there is only evidence of one conversation between Nugara and Esposto on betting systems (or "lines"). Clearly, this single act or "behavior" cannot be viewed as substantially affecting anything.

Bell's conviction was reversed because

> "Bell was not shown to have regularly accepted and used McCoy's line information, nor is there any evidence suggesting that Bell would regularly accede to McCoy's line when given that information." 539 F.2d at 1062.

In the case *sub judice*, Nugara is not shown to have "regularly accepted and used" line information or the like from Esposto or anyone else. Furthermore, the single telephone recording demonstrates that Nugara certainly did not "accede" to Esposto regarding the manner in which he operated his (Nugara's) bookmaking activities. See also: *United States v. Todaro*, 550 F.2d 1300 (2d Cir. 1977).

CONCLUSION

For the reasons discussed above, Petitioners request a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA
Plaintiff

v.

ORPHIA A. ESPOSTO aka
"ORPHIE"
MICHAEL J. MARTORELLA aka
"MIKE"
JOSEPH NUGARA, JR. aka
"JOE"
ANTHONY JOSEPH MARTORELLA
aka "CHOOKIE"
DOMINIC NICHOLAS DI SILVIO
aka "DOM", aka "D"
NORMA JEAN LAME
ANTHONY MICHAEL WINCKO aka
"TONY"
Defendants

Criminal No. 74-185

ORDER

AND NOW, this 3rd day of August, 1976, upon consideration of motion of defendants to suppress wiretap evidence against them, and of briefs in support thereof, and in opposition thereto, after argument, and it appearing that pursuant to an illegal wiretap application on the telphone of one William Cihal [see *U.S. v. Cihal*, 336 F. Supp. 261] evidence concerning defendants Michael J. Martorella and Anthony J. Martorella was obtained; and that later an application of April 12, 1973, specifically naming said defendants was made but which did not mention the prior unlawfully obtained "leads" or clues; and it appearing that evidence obtained against said defendants pursuant to said

order of April 12, 1973, is *prima facie* "fruit of the poisonous tree" and subject to suppression, unless the government is prepared to offer proof of independent origin;

It Is Ordered that said motion be and it hereby is granted, to the extent that all evidence against defendants Michael J. and Anthony J. Martorella obtained in pursaunce of said order of April 12, 1973, be and it hereby is suppressed; and that said motion in all other respects be and it hereby is denied; provided that, within 15 days hereof, the government may file a motion offering to prove independent origin; and that within the same period of 15 days any other defendant may file a motion offering to prove that he too was a defendant or party intercepted in the illegal wiretap against Cihal.

...../s/ Dumbauld.....
United States District Judge

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United States Court of Appeals

For The Third Circuit

NOS. 76-2653/4/5, and 77-1094/5

UNITED STATES OF AMERICA

V.

ORPHIA A. ESPOSTO a/k/a ORPHIE
MICHAEL J. MARTORELLA a/k/a MIKE
JOSEPH NUGARA, JR. a/k/a JOE
ANTHONY JOSEPH MARTORELLA a/k/a CHOOKIE
DOMINICK NICHOLAS DI SILVIO a/k/a DOM a/k/ "D"
NORMA JEAN LAME
ANTHONY MICHAEL WINCKO a/k/a/ TONY
Michael J. Martorella, appellant in No. 76-2653
Anthony Joseph Martorella, appellant in No. 76-2654
Anthony Michael Wincko, appellant in No. 76-2655
Orphia Esposto, appellant in No. 77-1094
Joseph Nugara, appellant in No. 77-1095

On Appeal from the United States District Court
for the Western District of Pennsylvania
Crim. No. 74-185

Argued October 17, 1977

Before: ADAMS and GARTH, *Circuit Judges*, and LAYTON, *District Judge*.*

*United-States District Judge for the District of Delaware, sitting by designation.

JUDGMENT ORDER

This Court has considered fully the contentions raised by the appellants. In particular, it has analyzed the arguments advanced by appellants Esposto and Nugara, namely, that the district court erred: (1) in not declaring that the evidence was insufficient to sustain convictions of Esposto or Nugara; (2) in not holding that the appellants were denied their constitutional right to a speedy trial; (3) in issuance of instructions to the jury; (4) in not concluding, first, that the procedure followed by the government in applying for a wiretap in the present case violated applicable statutory standards, *see* 18 U.S.C. §§2518(1) (e) and (2), or second, that it was based on a material misrepresentation of fact; and (5) in not declaring that the continued surveillance of Martorella's telephone violated the Fourth Amendment and 18 U.S.C. §§2518(1) (d) and (5).[1]

Further, we have considered the arguments raised by appellant Martorella, which include those claims numbered (2), (4) and (5) in paragraph 1.

Finally, we have scrutinized the contentions presented by appellant Wincko, which include those claims numbered (2) and (4) in paragraph 1.

1. The argument that appellants are "aggrieved persons" for purposes of the wiretap statute and so can challenge the legality of the surveillance is not a separate claim, but is the predicate for the appellants' direct attacks on the wiretap, which this Court has considered carefully.

In light of our review, it is

ADJUDGED AND ORDERED that the judgment of the district court be and it is hereby affirmed.

BY THE COURT,

/s/ ALLEN M. DELANEY
Circuit Judge

ATTEST:

/s/ THOMAS F. QUINN
Thomas F. Quinn, *Clerk*

DATED: October 26, 1977

Supreme Court, U. S.
FILED
FEB 25 1978
MICHAEL RODAK, JR., CLERK

No. 77-886

In the Supreme Court of the United States

OCTOBER TERM, 1977

MICHAEL J. MARTORELLA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.,
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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The court of appeals affirmed by judgment order (Pet. App. B).

JURISDICTION

The judgment of the court of appeals was entered on October 26, 1977, and a petition for rehearing was denied on November 17, 1977. The petition for a writ of certiorari was filed on December 16, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the government's application for an intercept order sufficiently listed the facts concerning "all previous applications * * * involving any of the same persons, facilities or places specified in the application * * *" in compliance with 18 U.S.C. 2518 (1)(e).

2. Whether "gross revenue of $2,000 in any single day," as used in 18 U.S.C. 1955, refers to the amount of money wagered with an illegal gambling business, not the money won by the gambling business.

3. Whether the evidence was sufficient to convict petitioner Nugara.

STATEMENT

Both Martorellas pleaded guilty in the United States District Court for the Western District of Pennsylvania to charges of operating an illegal gambling business and conspiracy to do so in violation of 18 U.S.C. 1955 and 371.[1] Following a jury trial petitioners Nugara and Esposto were convicted on both counts.[2] Michael Martorella and Esposto were sentenced to three years' imprisonment and fined $20,000. Nugara and Anthony Martorella were sentenced to two years' imprisonment and fined $10,000. The court of appeals affirmed (Pet. App. B).

[1] The Martorellas entered a conditional guilty plea preserving their right to challenge the legality of the wire interception on appeal. Co-defendants Anthony Wincko and Dominic Di Silvio also pleaded guilty to the charges.

[2] The indictment was dismissed against co-defendant Norma Jean Lame during the Esposto-Nugara trial.

The evidence at the Esposto-Nugara trial showed that in April 1973 petitioners and several others operated an illegal gambling business headquartered at the Braddock News Agency, a business owned jointly by Esposto and Michael Martorella in Braddock, Pennsylvania (Tr. 66–68). A court-ordered electronic surveillance of six telephone lines over some fifteen days produced most of the evidence. Five of the telephones were situated in the Braddock News Agency and the sixth in Michael Martorella's private residence (Tr. 13–14, 29, 39). Gambling paraphernalia, cash and other evidence of an illegal gambling business were also seized during searches of the Esposto and Martorella residences, the Braddock News Agency, and the Comet News Agency, a business owned and operated by Nugara across the street from Braddock News (Tr. 33–34, 525–583).

ARGUMENT

1. In 1970 the government applied for a court order authorizing electronic surveillance of telephones owned by William Cihal. The application did not name any of the petitioners as persons whom the government expected to intercept, but both Martorellas were overheard during the surveillance of Cihal's phone. In a subsequent criminal proceeding instituted against Cihal, the Martorellas and nine others, the United States District Court for the Western District of Pennsylvania suppressed those intercepted conversations. *United States* v. *Cihal*, 336 F. Supp. 261.

a. Petitioners contend that since the government's application for a wire interception in the present case

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did not refer to the previous *Cihal* interception, it violated the requirements of 18 U.S.C. 2518(1)(e).[3] The courts of appeals, however, have unanimously interpreted Section 2518(1)(e) to require disclosure of previous "applications" involving the same parties but not all previous "interceptions" of those parties. *United States* v. *Easterling*, 554 F. 2d 195, 196 (C.A. 5); *United States* v. *Sklaroff*, 552 F. 2d 1156 (C.A. 5), certiorari denied *sub nom. Goldstein* v. *United States*, No. 77-169, January 9, 1978; *United States* v. *Florea*, 541 F. 2d 568, 576 (C.A. 6), certiorari denied, 430 U.S. 945, rehearing denied, 431 U.S. 925.

In the very nature of things, most approved applications generate a multitude of conversations wholly or partially intercepted. To require the listing of all previous interceptions would hobble the government with an unmanageable burden which Congress did not wish to impose. Accordingly, Congress chose the narrower word "applications," rather than broader term "interceptions," when drafting Section 2518(1)(e). We submit the courts of appeals have correctly construed this statutory provision.[4]

[3] Only Michael Martorella has standing to raise this issue, since he was the sole person overheard during the *Cihal* interception who was also a target of this interception. Anthony Martorella, although overheard during the *Cihal* interception, was not named in or a target of this interception. Hence, he could not expect the government to enumerate his previous interceptions in this application.

[4] Petitioner's contention (Pet. 8–9) that *United States* v. *Bellosi*, 501 F. 2d 833 (C.A.D.C.), says that "applications" is a broader term than "interceptions" is wrong. *Bellosi* states just the contrary.

b. In any event, assuming *arguendo* a violation of the statute, suppression is not compelled. Suppression would be mandated here only if "the communication was unlawfully intercepted." 18 U.S.C. 2518(10)(a)(i).[5] Here the district court found that the present application was not the "fruit" of the *Cihal* interception but was based on facts gathered from other sources, and petitioners do not challenge that finding. Accordingly, the *Cihal* interception did not play a "'substantive role' with respect to [the] judicial authorization of [the] intercept orders." *United States* v. *Donovan*, 429 U.S. 413, 435; *United States* v. *Chavez*, 416 U.S. 562, 574–575. Furthermore, the fail-

501 F. 2d at 839 n. 13. *Bellosi*, in holding that the government must list all prior "applications," notes that Congress may have required disclosure of all previous *applications*, instead of all prior *interceptions*, to avoid unduly burdening the Government and to avoid an ambiguity which inheres in the latter word and which is not clearly resolved by its use elsewhere in the statute" (emphasis by the court). *Ibid.*

The *Bellosi* court also notes that if petitioner's interpretation prevailed, the government would have a "substantial burden of informing the judge from whom an authorization was sought of each individual conversation which had been previously intercepted using the same facilities or places or involving the same persons * * *." *Ibid.*

[5] 18 U.S.C. 2518(10)(a) triggers suppression where:

"(i) the communication was unlawfully intercepted;

"(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

"(iii) the interception was not made in conformity with the order or authorization or approval."

The latter two circumstances plainly do not apply here. See *United States* v. *Donovan*, 429 U.S. 413, 432.

ure to list the earlier intereception was irrelevant to the criteria[6] which govern the approval of an intercept application. See *Chavez, supra; Donovan, supra,* 429 U.S. at 435; *United States* v. *Abramson,* 553 F. 2d 1164, 1170 (C.A. 8), certiorari denied, No. 76–1672, June 27, 1977.[7]

2. 18 U.S.C. 1955(b)(1)(iii) defines an illegal gambling business as one which "has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day." Nugara and Esposto contend that "gross revenue" should be measured by "* * * the amount of monies won by the gambling business and not by the amount of monies wagered with the business" (Pet. 17), even though they concede that it

[6] 18 U.S.C. 2518(3) (a)–(d) provides "* * * that the issuing judge may approve an intercept application if he determines that normal investigative techniques have failed or are unlikely to succeed and there is probable cause to believe that: (i) an individual is engaged in criminal activity; (ii) particular communications concerning the offense will be obtained through interception; and (iii) the target facilities are being used in connection with the specified criminal activity." *Donovan, supra,* 429 U.S. at 435.

[7] The alleged conflict (Pet. 8–9) between *Abramson, supra,* and *Bellosi, supra,* does not exist. The two cases differ factually. In *Abramson,* the government voluntarily disclosed the previous interception while failing to disclose that interception's suppression. In *Bellosi,* the government deliberately concealed the previous application even though it named the defendant. Hence, in *Abramson,* there was at least partial compliance with the statute, and suppression was not required; in *Bellosi* there was no compliance, and accordingly the court chose to suppress the intercepted conversations. Here, the government in good faith complied with the language of the statute, and suppression therefore is not warranted.

should not be measured by "net profit" (Pet. 15). However, the courts have consistently defined "gross revenue" as the total amount wagered in one day. *United States* v. *Sacco,* 491 F. 2d 995, 1001 (C.A. 9) (*en banc*); *United States* v. *Ceraso,* 467 F. 2d 653, 656–657 (C.A. 3); *United States* v. *Schullo,* 363 F. Supp. 246, 248–249 (D. Minn.), affirmed *sub nom. United States* v. *Thomas,* 508 F. 2d 1200, 1203 (C.A. 8), certiorari denied, 421 U.S. 947. As the *Ceraso* court noted, the government's task would be enormously complicated if it had to determine not only the amount of daily wagers, but also which of those wagers were won by the bookmaker rather than the bettor. 467 F. 2d at 657. The statute is aimed at large gambling enterprises, the size of which is more accurately measured by the volume of wagers and should not depend on the "luck of the odds" for any single day. *Sacco, supra,* 491 F. 2d at 1001.

The legislative history supports our interpretation of the Act. During the House and Senate debates, several Congressmen referred to "gross revenue" as the amount wagered, thereby adopting the definition given that term in the Report of the President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* (February 1967).[8]

3. Petitioner Nugara contends that the evidence did not prove that he participated in the Martorella-

[8] See, *e.g.*, remarks of Senator Hruska, 115 Cong. Rec. 10736 (1969); Congressman Poff, 116 Cong. Rec. 35295 (1970); Senator Allott, 116 Cong. Rec. 603–604 (1970); Senator Byrd, 116 Cong. Rec. 606 (1970); Senator McClellan, 115 Cong. Rec. 5873 (1969), 116 Cong. Rec. 590 (1970).

Esposto gambling business, but rather showed that he competed against it. However, there was a taped telephone call from Nugara to Esposto which, the jury could reasonably have concluded, showed his cooperation and complicity (Tr. 338–340). The conversation refers frequently to "we"; for example, "we might get a bad break once in a while," "why don't we go along like we talked about it the other day until the end of the week," and "why don't you leave it the way we agreed the other day, and see what happen [sic] by the end of the week, then we'll sit down Sunday and talk it over." At the end of the conversation Esposto ordered Nugara to send "Jim" over. Whether the conversation showed cooperation or competition was a question of fact to be determined by the jury. Viewed in a light most favorable to the government, the jury could find that it showed a disagreement between two members of a single conspiracy with conflicting ideas on the best method of achieving financial success for their gambling business.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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